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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 286

ALABAMA-TENNESSEE NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Alabama-Tennessee Natural Gas Company, Petitioner herein, respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on March 25, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. pp. 1a-43a) is reported at 359 F. 2d 318 (1966). The opinions and orders of the Federal Power Commission (R. 126-77, 202-14) are reported at 31 F.P.C. 208 and 31 F.P.C. 928 (1964).

JURISDICTION

The judgment of the Court of Appeals (App. p. 44a) was entered on March 25, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Where the Federal Power Commission, the Court below and all parties agree that Congress, in enacting Section 167 of the Internal Revenue Code of 1954, intended to provide all industries, including companies regulated by the Commission, with an economic incentive to expand their facilities, can the Commission deprive such companies of the intended benefits by requiring them to be passed on to the companies' customers in the form of reduced rates?

2. Whether a regulatory agency denies the fair and adequate hearing required by the "due process" clause of the Constitution when it announces for the first time, twenty months after the close of the record, an intention to review prior judicially-approved Commission decisions on which there has been extensive industry reliance and thereafter, without reopening the record or according an opportunity to present evidence or cross-examine, undertakes to reverse such decisions on factual findings based on materials *de hors* the record?

STATUTES INVOLVED

The pertinent provisions of Sections 4(d) and 4(e) of the Natural Gas Act, 15 U.S.C. 717 c (d) and (e) and of Section 167 of the Internal Revenue Code of 1954, 26 U.S.C. 167, are set out in the Appendix, *infra*, pp. 45a-48a.

STATEMENT

Alabama-Tennessee Natural Gas Company (Alabama-Tennessee) owns and operates a natural gas pipeline system extending approximately 140 miles from an interconnection with its sole supplier, Tennessee Gas Transmission Company, at a point near Selmer, Tennessee, in an easterly direction to its terminus at Huntsville, Alabama. Alabama-Tennessee serves fifteen small resale customers and five direct sale customers. As of December 31, 1959, Alabama-Tennessee had a net plant in service of slightly more than $5,000,000 and an accumulated reserve for deferred taxes of $100,000 (R. 157). Because it transports and sells natural gas in interstate commerce for resale, the rates charged by Alabama-Tennessee for such sales are subject to regulation by the Federal Power Commission under the Natural Gas Act.

On February 3, 1964, the Commission, then including four newly appointed members (see App. p. 7a fn. 9), issued its Opinion No. 417 in which, by a bare 3-2 majority, the Commission completely reversed its prior construction of the Congressional intent with regard to Section 167 of the Internal Revenue Code of 1954. In so doing, it deprived Alabama-Tennessee of the benefits thereof by directing it to file reduced rates to reflect the temporary reduction in Federal income taxes resulting from its use for tax purposes of the liberalized method of depreciation as permitted by that Section (R. 153-54). On appeal, the Court below affirmed the Commission (App. p. 43a).

Section 167 of the Internal Revenue Code

In 1954, Congress, in order to stimulate further expansion and growth in the national economy, enacted what became Section 167 of the Internal Revenue

Code of that year. By that provision, Congress gave to taxpayers a new election, in computing depreciation for federal income taxes, between several liberalized depreciation methods and straight line depreciation[1] which had almost invariably been used previously. Under the liberalized depreciation methods thus permitted, the depreciation expense allowed a company for tax purposes is greater and the federal income tax lower during the early years of the life of the depreciable property than under straight line depreciation. However, this is offset by lower depreciation allowances for tax purposes, and hence higher taxes, in the later years of the property's life. Consequently, liberalized depreciation has no net effect, all other factors remaining constant, on a company's tax liability over the life of the property concerned.

Since federal income tax expense is one of the costs comprising the "cost of service" upon which the Commission fixes the rates of natural gas pipeline companies subject to its jurisdiction, the Commission has had to consider, in connection therewith, the rate effect to be given a company's use of liberalized depreciation. As shown below, for many years and indeed until its decision in the instant proceeding, the Commission had "normalized" the income taxes of such companies. By such normalization, the Commission computed the allowance for income taxes included in the company's cost of service on the basis of straight line depreciation and directed that the difference between the taxes paid and the normalized tax allowance be placed in a deferred tax reserve until needed to pay increased taxes in later years. Until so needed, the funds were

[1] As its name suggests, the depreciation under the straight line method is the same, year to year, over the life of the property.

available to the company for the financing of additional plant and equipment, but not for the payment of dividends or other distribution to its stockholders.

In contrast, in the instant proceeding, the Commission has required Alabama-Tennessee to "flow through" the benefits of liberalized depreciation, *i.e.*, to pass such benefits on immediately to Alabama-Tennessee customers in the form or reduced rates. The effect of such a requirement is to frustrate the intent of Congress by prohibiting the company from retaining and investing the deferred tax funds which become available through the use of liberalized depreciation, and to destroy any assurance that the company will be able to meet the increased tax obligations arising in the future as a result of the initial deferral of taxes through utilization of liberalized depreciation. But the Commission did not stop at directing flow-through to be applied to *future* plant additions. It also denied all earnings on plant constructed in *prior* years with funds generated through the use of liberalized depreciation despite the consistent and repeated pronouncements of the Commission and the subsequent judicial assurances to the contrary. In so doing, the Commission totally disregarded the fact that Alabama-Tennessee and other members of the industry elected to utilize the liberalized depreciation provisions of Section 167 of the Internal Revenue Code based upon these assurances.

The Commission's Prior Practice

For a period of ten years following the enactment of Section 167, the Commission consistently found that, in order to effectuate the intent of Congress, it was necessary to provide for the normalization of taxes and to permit a return on the funds generated thereby.

Shortly after the enactment of Section 167, the Commission instituted a rule-making proceeding on the petition of several pipeline companies which sought to remove the uncertainties relating to the rate-making and accounting procedures to be followed in dealing with liberalized depreciation permitted by Section 167. *Amere Gas Utilities Company, et al.*, 15 F.P.C. 760, 781 (1956). As a result of that proceeding, the Commission found that the use of liberalized depreciation resulted in a tax deferral rather than a tax saving (15 F.P.C. at 782). Further commenting that it did not have the power to "strike down an act of Congress if we think it unwise, or unnecessary to a particular industry, and enforce it only if it is in accord with our economic and regulatory philosophy" (*Id.* at 782), the Commission concluded that to require "flow through" of the tax deferrals resulting from the use of liberalized depreciation would frustrate "the clear and obvious Congressional intent" in enacting Section 167 (*Ibid.*)[2]

Subsequent to *Amere*, many pipeline companies relying on this formal Commission pronouncement, elected to invoke the benefits of the liberalized depreciation incentive offered them by Congress. This was further encouraged by the Commission itself when it consistently applied the normalization principle in the further proceedings as they arose and was upheld on

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[2] In so holding, the Commission followed its own earlier decision in *Panhandle Eastern Pipe Line Co.*, 13 F.P.C. 53, 82 (1954), in which it had ruled that accelerated amortization for tax purposes under Section 168 of the Internal Revenue Code should be normalized in fixing the company's rates in order to effectuate the Congressional intent. This ruling was approved in *City of Detroit* v. *F.P.C.*, 230 F. 2d 810, 822 (D. C. Cir. 1955), *cert. denied*, 352 U.S. 829 (1956).

judicial review. *El Paso Natural Gas Co.*, 22 F.P.C. 260, 267 (1959), remanded on other grounds, *El Paso Natural Gas Co.* v. *F.P.C.*, 281 F. 2d 567 (5th Cir. 1960), *cert. denied*, 366 U.S. 912, (1961); *United Fuel Gas Co.*, 23 F.P.C., 127, 130-31 (1960), remanded on other grounds, *Cities of Lexington* v. *F.P.C.*, 295 F. 2d 109 (4th Cir. 1961); *Phillips Petroleum Co.*, 24 F.P.C. 537, 570 (1960), aff'd *Wisconsin* v. *F.P.C.*, 303 F. 2d 380 (D. C. Cir. 1961) aff'd, 373 U.S. 294 (1963); *Northern Natural Gas Co.*, 25 F.P.C. 431 (1961); *Kansas-Nebraska Natural Gas Co.*, 25 F.P.C. 448 (1961); *Panhandle Eastern Pipe Line Co.*, 25 F.P.C. 550 (1961); aff'd, *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 316 F. 2d 659 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 881 (1963).

The Orders Under Review

During the period between 1954 and 1959, Alabama-Tennessee filed rate increases under Section 4(d) of the Natural Gas Act, solely to recoup increases in the cost of purchasing gas from its supplier.[3] At the hearing thereon, there did not appear to be any need to present any evidence in support of the Commission's normalization practice, since the Commission's treatment of the use of liberalized depreciation was well established and had been judically approved. Neither Alabama-Tennessee nor the Commission Staff presented any evidence on this subject. While an intervenor, Tennessee Valley Municipal Gas Association (Gas Association), the only party presenting evidence on this issue, offered

[3] As is usual with such rate increase filings, each was suspended for the statutory period of five months.

evidence in support of its position favoring "flow through", such evidence was of the same type and by the same witness as had been consistently rejected by the Commission in prior proceedings.

Twenty months after the close of the record and eleven months after the Examiner's proposed decision herein dated September 25, 1961, in which he adhered to normalization of liberalized depreciation, the Commission, on June 1, 1962, *for the first time,* indicated a possible departure from its prior determinations[4] by scheduling oral argument on the manner of determining the tax allowance to be included in Alabama-Tennessee's cost of service (R. 64-66).[5] Alabama-Tennessee sought rehearing but the Commission, holding its June 1, 1962 order to be merely interlocutory, treated Alabama-Tennessee's application as only a motion for reconsideration and denied it (R. 113-116). Following several delays,[6] oral argument was finally

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[4] While the Commission's order refers to several orders in which it had purportedly indicated an intent to reexamine the question, it should be noted that each of these orders was issued long after the record herein was closed and related to electric companies subject to regulation under another act.

[5] The Commission specifically requested that the oral argument be "directed toward the several possibilities for handling this matter, namely, use of the present procedure [normalization] with rates of return at 0, 1.5, or such higher rate as may be deemed to be in the public interest, or alternatively, use of the so-called 'flow-through' principle under which the reduction in taxes through the use of liberalized depreciation instead of straight-line depreciation, would be reflected in income taxes included in the pipeline's cost of service" (R. 65).

[6] In the meanwhile, the Commission entered its Opinion No. 360 deciding all other issues relating to Alabama-Tennessee's rates, but keeping the proceeding open to enable it to reconsider and reexamine the treatment of liberalized tax depreciation (R. 67-98).

held in May, 1963, in which, pursuant to the invitation in the Commission's June 1, 1962, order, there participated numerous *amici* who had not been parties in the case.

Thereafter, on February 3, 1964, the Commission issued its Opinion No. 417 and order here under review. Without any indication of changed circumstances and without reopening the record to permit cross-examination or the receipt of countervailing evidence, the Commission repudiated its prior consistent conclusion and determinations. Instead it found that the use of liberalized depreciation resulted not in a tax deferral, but rather in a tax saving for natural gas pipelines such as Alabama-Tennessee, which, according to the Commission, maintain "growing or stable plant for the foreseeable future" (R. 152). Further, the Commission found, again in the teeth of its prior decisions, that "Congress did not attempt to prescribe the manner in which [this] Commission should reflect such tax benefits in rates established under the Natural Gas Act (R. 152), and that flow-through will "effectively" meet "the fundamental objective of Section 167 of the Internal Revenue Code, to benefit the national economy by stimulating plant modernization and expansion" (R. 152). Accordingly, concluding that there was no "present factual justification" for treating the funds as deferred taxes that would normally be payable under straight-line depreciation (R. 153), the Commission held that Alabama-Tennessee's prospective rates "should reflect only the actual taxes currently payable during the applicable test year" (R. 153) and directed Alabama-Tennessee to file new rate schedules reflecting

the lower federal income tax allowance and the smaller rate base.[7]

Following the Commission's denial of its application for rehearing (R. 202-14), Alabama-Tennessee sought review in the Court below, which affirmed the Commission's decision. While recognizing that the Commission has performed an "about face" in a "singularly eccentric" manner (App. p. 37a), the Court below upheld the Commission's requirement that Alabama-Tennessee flow through to its customers the benefits from the use of liberalized depreciation as a matter within the Commission's special competence or discretion.

REASONS FOR GRANTING THE WRIT

Through a long series of Commission and Court decisions dealing with the rate treatment to be accorded natural gas pipeline companies in their use of liberalized depreciation authorized by Section 167, the industry was advised that the Commission sanctioned the concept of normalization and would provide at least 1½% return on the funds generated thereby. Since the industry exercised its statutory option on the basis of these court-approved determinations in electing to utilize liberalized depreciation, these consistent and judicially sanctioned pronouncements have become imbedded in the economic fabric of pipeline expansion programs. In the instant case, the Commission, with the approval of the Court below, has not limited it-

[7] While permitting Alabama-Tennessee to retain the deferred tax funds accumulated in the past as a contingency reserve (not a segregated fund), to offset any increased taxes in the future resulting from a decline in total tax depreciation deduction (R. 153), the Commission directed that Alabama-Tennessee not be allowed any return on these funds or the facilities constructed therewith.

self to repudiating normalization in favor of flow through with regard to future *plant* additions; it has gone much further and denied *all* earnings on plant constructed in *prior years* with the funds previously generated by the use of liberalized depreciation, all in the teeth of the industry action taken in reliance upon prior judically approved precedents.

Not only does the decision below thus approve a critical "about-face" by the Commission, but it conflicts with the decision of the Court of Appeals for the District of Columbia Circuit in *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 316 F. 2d 659 (1963) *cert. denied*, 378 U.S. 881 (1963). Moreover, the decision below is demonstrably unsound; because it is based (1) upon a misconstruction of the purport and intent of Section 167, and (2) upon admittedly critical findings made on a bob-tailed record and without adequate notice or opportunity to Alabama-Tennessee to cross-examine or submit rebuttal evidence. Since, in addition, the question admittedly is of far reaching importance, potentially affecting virtually every natural gas pipeline company and electric utility subject to Commission regulation (R. 127-8), review by this Court is clearly called for.

1. The decision of the Court below, we submit, conflicts with the decision of the D. C. Court of Appeals in *Panhandle Eastern Pipe Line Company* v. *F.P.C, supra.* In contrast to the holding below that the Commission's switch from normalization to flow through of the benefits from the use of liberalized depreciation does not violate the Congressional purpose in enacting Section 167 (App. p. 27a), the D. C. Court of Appeals has taken a completely opposite view of the legislative intent underlying Section 167 and hence has reached

a result wholly inconsistent with that of the Court below.

Formulating the question presented in *Panhandle* as (316 F. 2d at 661-2):

> "* * * whether the congressional purposes underlying the tax and gas acts are effectuated by permitting a rate of return on the funds generated by the use of liberalized depreciation no higher than that required to provide the company with 'a sufficient incentive to continue to use liberalized depreciation.'"

the D. C. Court of Appeals has expressly recognized not only that:

> "* * * the legislative history reveals that Congress intended the statute 'to have far-reaching economic effects' extending to 'all segments of the American economy.' Liberalized depreciation was seen as a means toward a broad economic goal; it was expected to 'assist modernization and expansion of industrial capacity, with resulting economic growth, increased production, and a higher standard of living'." (*Id.* at 662)

but also that:

> "To set this economic spiral in motion, producers must, of course, be willing to invest in plant and incur the attendant risks. Congress permitted 'acceleration in the speed of the tax-free recovery of costs [because it considered this] of critical importance in the decision of management to incur [such] risks.' * * *" (*Ibid.*)

Further accepting the thesis—with which all nine judges sitting *en banc* agreed unanimously—that normalization was necessary as one step toward providing business with an incentive to invest in the requisite

new facilities, the majority of the D. C. Court of Appeals concluded that the 1.5% return, there allowed by the Commission, provided sufficient incentive for the continued use of liberalized depreciation and hence appropriately implemented the purpose of Section 167 (*Id.* at 663).[8]

Notwithstanding the suggestion of the Court below to the contrary (App. p. 15a), *Panhandle* does not leave the way open for the Commission to switch to the flow-through principle. The fundamental premise of the *Panhandle* decision is that if all the benefits of Section 167 are taken from the taxpayer as they would be by the Commission's adoption of the flow-through principle, the incentive provided by liberalized depreciation would be eliminated and the Congressional purpose thereby frustrated. Since it is only under normalization that deferred tax funds are generated, it is obvious that the question of the proper return to be allowed on such funds is only reached if the accumulation of the funds themselves is proper. Consequently, the Court below plainly erred in failing to recognize that the clear effect of the D. C. Court of Appeals' decision is that normalization is essential to effectuate the Congressional intent. As the latter explicitly stated:

> "* * * the congressional purpose could not be adversely affected *unless the regulated companies were prevented from re-employing recovered funds* at a sufficient profit to provide incentive to initial investment" (316 F. 2d at 662; emphasis supplied).

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[8] In a vigorous dissent, four judges were of the firm view that the allowance of a full return on the tax accruals was required by the legislative intent behind Section 167 (316 F. 2d at 663, *et seq.*).

"Since there is no indication that Congress intended to bestow upon the producers *qua* producers any benefits beyond those necessary to provide incentives to investment, we conclude that, if a return of 1.5 percent taken with the other advantages does provide such incentive, the Commission's decision would be consistent with the congressional policy underlying the tax statute" (*Id.* at 663).

2. The legislative history of Section 167 reveals the *validity* of the D. C. Court of Appeals' thesis in *Panhandle, supra,* that normalization effectuates the Congressional intent, and the *error* in the holding below that the regulatory treatment of liberalized depreciation was left to the "special competence" or "discretion" of the Commission.

Prior to the enactment of Section 167 in 1954, Congress had considered at length the various possible changes in the tax laws which it might adopt to stimulate the national economy. By the enactment of Section 167, Congress made known its decision to extend direct tax relief to businesses in the form of liberalized depreciation. This it did in order to provide tangible benefits in the form of increased after-tax revenues and cash flow to businesses investing in new plant and thereby stimulating the national economy. For example, both the House Committee on Ways and Means and the Senate Committee on Finance, affirmed this purpose in identical language:[9]

"More liberal depreciation allowances are anticipated to have far-reaching economic effects. The

[9] Report of the House Committee on Ways and Means, to accompany H.R. 8300, H. Rep. No. 1337, 83rd Cong., 2d Sess., p. 24 (1954). Report of the Senate Committee on Finance, to accompany H.R. 8300, S. Rep. No. 1662, 83rd Cong., 2d Sess., p. 26 (1954). Much of the House Report is repeated almost verbatim in the Senate Report.

> incentives resulting from the changes are well timed to help maintain the present high level of investment in plant and equipment. The acceleration in the speed of the tax-free recovery of costs is of critical importance in the decision of management to incur risk. The faster tax write off would increase available working capital and materially aid growing businesses in the financing of their expansion."

Similarly, the legislative history is clear that Congress intended no limitation on the types of tangible depreciable assets upon which liberalized depreciation could be taken nor upon the types of businesses or industries which could take liberalized depreciation under Section 167. Also, the legislative history clearly indicates that Congress intended the immediate tax benefits to be available to all businesses. There is nothing to indicate that these benefits would be subject to later nullification by the action of regulatory agencies. As stated by the House Ways and Means Committee (H. Rep. No. 1337, 83rd Cong., 2d Sess., p. 24):

> ". . . For *all* segments of the American economy, liberalized depreciation policies should assist modernization and expansion of industrial capacity, with resulting economic growth, increased production, and a higher standard of living." (emphasis supplied).

In the same vein, the Senate Finance Committee commented (S. Rep. No. 1662, 83rd Cong., 2d Sess., p. 25):

> "The liberalized depreciation methods provided in the bills are to apply to *all* types of tangible depreciable assets, including farm equipment, machinery and buildings, rental housing, and industrial and commercial buildings as well as machinery, and equipment. * * *" (emphasis supplied).

While both the Commission and the Court below recognized Section 167 as a "tax incentive" provision, they disregarded the nature of the incentive intended by Congress and by so doing they committed further serious error. In lieu of the direct incentive by which Congress intended to encourage business investment and hence to stimulate the economy, the Commission, with the approval of the Court below, found, without any evidentiary support that a comparable result could be achieved by other means, namely, that reduced rates would stimulate gas sales which in turn would increase demand and hence also stimulate the economy (R. 148-9).

But this is not the method adopted by the Congressional majority in enacting Section 167. Indeed, the Commission's approach precisely accords with the rejected views of the Congressional minority,[10] which opposed Section 167 and, like the Commission, favored stimulating the economy by encouraging consumer demand through tax reductions rather than through enactment of Section 167. Since Congress, however, deliberately rejected this *indirect* approach and chose instead the *direct* business stimulus embodied in Section 167, the Commission's purported "special competence" or "discretion" clearly does not ex-

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[10] As set out in H.R. Rep. No. 1337, 83rd Cong., 2d Sess. (1954) at App. B 4, it was the view of the Committee minority:

> "* * * that the most effective way to [offer incentives to businesses] * * * is not through tax reductions for corporations and investors, but tax reductions which will immediately increase purchasing power in the hands of consumers. * * * With all kinds of incentives offered them, businesses will not expand where they have no markets."

See also: "Liberalized Depreciation; About-Face By The F.P.C.", 30 Va. L. Rev. 298-336 (Mar. '64).

tend to permitting it to do what it expressly recognized in *Amere* it had no power to do, namely, "* * * to strike down an act of Congress if we think it unwise, or unnecessary to a particular industry, and enforce it only if it is in accord with our economic and regulatory philosophy" (15 F.P.C. at 782).

The Commission and the Court below further erred in their assumption that giving effect to Section 167 as intended by Congress might create a conflict between Section 167 and the Natural Gas Act with the consequence of "interfering with the FPC's duty [under the Natural Gas Act] to fix 'just and reasonable rates' " (App. p. 20a). The fact is, however, that the effectuation of the Congressional purpose underlying Section 167 does not in any way interfere with the discharge of the Commission's responsibilities under the Natural Gas Act.[11] This is clearly shown by the series of court decisions set forth at page 7, *supra*. Congress intended the taxpayer company, not the consumer, to receive the benefits of Section 167 as an incentive for plant expansion. Like the comparable Section 168, relating to accelerated amortization, Section 167 "unlike the Natural Gas Act itself, is not for consumer benefit" and has "a different public policy [which] should be given effect as intended by Congress" *City of Detroit* v. *F.P.C.*, 230 F. 2d 810, 822 (D.C. Cir., 1955), *cert. denied*, 352 U.S. 829 (1956).

Moreover, permitting the taxpayer companies to retain the benefits of Section 167 does *not* result in

[11] In this connection, it is to be noted that normalization not only effectuates the Congressional purpose underlying Section 167, but is, in fact, the only way by which future customers can be protected against increased future taxes resulting from the use of liberalized depreciation.

increasing the rates to the customers. As the D.C. Court of Appeals stated in *City of Detroit, supra* at 822:

> "* * * the [normalization] solution of the Commission does not result in higher rates to the consumer. It simply does not operate to reduce them. It aids Panhandle but neither aids nor harms petitioners. * * *"

See also, *United Fuel Gas Co.*, 23 F.P.C. 512 where the Commission said at 513: "The customer is not injured by liberalized depreciation; it pays a rate as though this tax incentive did not exist". In a word, Section 167 concerns only the taxpayer companies and the United States Treasury without in any way, involving the consumers of natural gas or Commission regulation under the Natural Gas Act.

3. The above substantive errors are compounded by the serious procedural infirmities infecting the Commission's factual findings underlying its conclusions. The Court below expressly recognized that the procedure followed by the Commission in arriving at these findings "invited adverse criticism" (App. p. 3a) and that it was "singularly eccentric" (App. p. 37a). However, the Court concluded that "taken separately or cumulatively, these eccentricities do not rise to the level of fatal procedural defects" (App. p. 37a). In so holding, the Court below, we submit, committed egregious error.

The Commission's conclusions herein are plainly predicated on several significant and critical findings of fact. Thus, the Commission's conclusions are based not only on its finding that flow through would in fact increase demand and hence stimulate plant expansion and the economy but also on its finding that liberalized depreciation results in a tax saving rather than a tax

deferral. Indeed, the Commission itself recognized as critical the "factual issue":

> "* * * whether Section 167 tax benefits will occasion a reasonably certain increase in future taxes or whether they essentially are a permanent tax reduction * * * the tax consequences of liberalized depreciation must be evaluated in the light of expert judgment as to probable future developments in such areas as demand for gas; plant capacity; the adequacy of gas reserves; the level of plant construction costs and the likelihood and impact of declining plant situations." (R. 142)

The record evidence admittedly was very limited—i.e., "* * * the only pertinent testimony came from one witness. And this lone witness was the intervenor's, not the Commission's witness" (App. p. 37a).[12] The Commission, in order to resolve these factual matters, improperly relied on untested predictions and estimates culled from secondary sources *de hors* the record which in most instances could not have withstood the scrutiny of cross-examination or rebuttal evidence had the record been reopened as it should have been.

The Commission's action was particularly inappropriate as these several factual findings of the Commission relate to highly controversial and speculative matters. In sharp contradiction to its findings here, the Commission itself had previously taken the position that the assumption of a continued plant growth by gas pipelines is "at best largely speculative and conjectural"[13] and further that:

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[12] As noted *supra*, pp. 7-8, comparable evidence by this witness on this subject had previously been consistently rejected by the Commission.

[13] See the Commission's Brief in opposition in *People of the State of California* v. *F.P.C.*, No. 599 O.T. 1960, p. 15. See, also p. 17.

> "Continued expansion for the indefinite future can more readily be assumed for the electric power and telephone industries than for gas pipelines, which are dependent on the continuing discovery of exhaustible gas reserves"[14]

In addition, contrary to the Court below, "the initial prejudice from lack of notice" which the Court found to exist did *not* "evaporate" (App. p. 40a). The Court below sought to justify its contrary conclusion by claiming that Alabama-Tennessee had failed to make appropriate efforts to introduce evidence subsequent to the Commission's scheduling of the depreciation issue for oral argument by its June 1, 1962 order issued twenty months after the record herein had been closed.[15]

The fact is that Alabama-Tennessee specifically and at length objected, in its applications for rehearing both to the June 1, 1962 order and to the Commission's Opinion of February 3, 1964, to the absence of an adequate record on which to decide the issues raised in said orders. Plainly, therefore, the Commission's "about face" was based on procedure which is not

[14] *Ibid.*

[15] It is unclear from the opinion below just how the Court viewed the situation prior to the issuance of the June 1, 1962, order. Thus, while the opinion states at one point that "petitioner received enough notice of [the] significance [of the issue] to have protected itself by rebuttal evidence before the end of the hearing" (App. p.38a), it is stated in the very next paragraph (App. pp. 38a-39a):

> "*At the time of the hearing* it was reasonable for petitioner to rely on the Commission's then well-established policy of allowing normalization. It was not unreasonable for the petitioner to assume that the Commission's failure to offer witnesses on flow-through normalization indicated that the Commission had no intention to reverse itself." (Emphasis supplied.)

merely "singularly eccentric" but which operated effectively to deny a fair hearing to Petitioner and the natural gas industry in general.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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